SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. **76-1815**

PETER A. VIGLIA, M.D.,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Peter A. Viglia, M.D., respectfully petitions this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit which was rendered on March 23, 1977.

OPINIONS BELOW

The Fifth Circuit's decision is reported at 549 F. 2d 335 and is reprinted in full as Appendix A to this Petition.

There were no written opinions of the District Court.

JURISDICTION

The judgment of the Fifth Circuit was rendered on March 23, 1977. A timely petition for rehearing and petition for rehearing en banc was filed, which petition was denied on May 20, 1977. (Appendix B) The judgment of the Fifth Circuit was entered on the date the petition for rehearing was denied. This petition is filed within thirty days thereafter, pursuant to U.S. Sup. Ct. Rule 22(2), Title 28, U.S. Code. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does a Trial Court abuse its discretion and apply an erroneous legal standard when it holds that a physician, who has never prescribed the type of drugs at issue, who has never treated a case of

adult or child obesity, who has no experience in the treatment of adult patients but is a pediatrician, but who is also trained in pharmacology, has been a member of the United States Pharmacoepia for the ten years preceding his testimony, and who has participated in overview committees in the treatment of adult obesity, is competent to render expert opinions on the questions whether the prescription of drugs for use by adults in the treatment of obesity is "in the course of professional practice" fnd "for a legitimate medical purpose" merely because he is a physician and pharmacologist by education?

2. Has plain error affecting a defendant's substantial rights to a fair trial and to the effective assistance of appellate counsel occurred when a prosecutor, propounding hypothetical questions to its "expert" witness, deviates from the evidence adduced from the fact witnesses

and interjects more incriminating information into the hypothetical questions than is represented by the evidence and thereby calls for an opinion which is not relevant to the testimony presented to the jury but which, in effect, would constitute an opinion on a substantially different case, when the defendant's trial attorney interposed no objection and the Court had effectively curtailed the defendant's personal interposition of objections to the proceedings?

CONSTITUTIONAL AMENDMENTS, STATUTES, REGULATIONS AND FEDERAL RULES INVOLVED

The Sixth Amendment to the United States Constitution, in relevant part, provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defence."

Title 21, United States Code, Section 841(a)(1), provides:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --- to * * * distribute, or dispense * * * a controlled substance * * *."

Title 21, United States Code, Section 802(10), provides:

> "The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject."

Title 21, U.S. Code, Section 802(11), provides:

> "The term "distribute" means to deliver (other than by administering or dispensing) a controller substance. The term "distributor" means a person who so delivers a controlled substance."

Title 21, United States Code, Section 802(20), provides:

> "The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States

or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research."

Title 21, United States Code, Section 821, provides:

"The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances."

Pursuant to the authority of §821, the Attorney General promulgated 21 C.F.R. §1306.04(a) (1975), which provides, in relevant part:

"A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. * * * An order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. §829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances."

Title 21, United States Code, Section 822(b), provides:

"Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter."

Rule 702, Fed. R. Evid., Title 28, U.S. Code, provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherise."

STATEMENT OF THE CASE

This is a prosecution of a physician for prescribing controlled drugs in a manner which the Government successfully contended to the Court and Jury, through a purported "expert" witness, were outside the course of professional practice and not for a legitimate medical purpose. The pro-

secution was based on 21 U.S.C.§841(a)(1) in the court of first instance. The District Court possessed exclusive original jurisdiction of these proceedings pursuant to 18 U.S.C. §3231.

The indictment charged Dr. Viglia with thirteen violations of §841(a)(1) by issuing prescriptions for controlled drugs without a legitimate medical reason. Dr. Viglia pleaded not guilty and was tried before a jury on December 1 and 2, 1975.

The Government called two undercover agents and a physician who specialized in the field of pediatrics, who had limited his private practice to this field, who had never treated a case of obesity or prescribed the drugs involved in this case throughout his entire professional career, adn who had not kept informed on the current literature or practice with respect to adult obesity problems. To be fair to this witness, he had degrees in medicine

and pharmacology, was a member of the United States Pharmacoepia, had previously taught pharmacology and is now teaching pediatrics at the Charity Hospital of Louisiana. The defense objected to the expert testimony from the Government's expert. The Court ruled (Tr. 73):

> "I believe Dr. Shirkey is qualified to testify as a witness, as a doctor of medicine, who has some expertise. He is familiar with many logical matters and some specialty, including, at least to some degree, the treatment of obesity. You ladies and gentlemen of the jury will have to determine how much expertise he has in this field."
>
> "A part of my ruling is that this man is a doctor, like other doctors who are permitted to testify as to the various aspect of human ailments. It isn't necessary for a doctor to be a surgeon to testify about surgery."

After Dr. Shirkey was recognized to be a competent expert, he was asked a series of hypothetical questions which substantially deviated from the evidence previously adduced from the undercover agents. Again, to be fair with the prosecutor, the questions posed to Dr. Shirkey may have to an

extent followed the official reports of the undercover agents, but they did not propound hypotheses which strictly correspond to the evidence presented through the agents at the trial. Defense counsel did not object to the questions propounded and present counsel was forced to present this issue in the Court below as one of "plain error" under Rule 52(b), F.R.Cr.P. The Fifth Circuit held that the variance between the testimony and the hypothets, "if error at all, does not amount to plain error affecting substantial rights." 549 F. 2d at 337.

The Court of Appeals also held that Dr. Shirkey's acceptance as an expert by the Trial Court was not "manifestly erroneous"; that "[w]hile Dr. Shirkey had no experience in treating patients for obesity, his knowledge, training and education in the fields of medicine and pharmacology were a sufficient predicate on which the trial court might accept him as an expert." 549 F. 2d at 337.

The Court of Appeals affirmed the judgment of conviction, which judgment petitioner seeks to have reviewed by this Honorable Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

This Decision Determines An Important Question of Federal Law Which Has Not Been, But Should Be, Decided By This Court

The Trial Court as well as the Court of Appeals have held that Dr. Harry C. Shirkey was competent to testify as an expert witness merely because he possessed certain general academic credentials, even though he had no practical or professional experience in the particular area of relevant inquiry. Because Dr. Shirkey is a physician and a pharmacologist, he was held to be competent to testify about all aspects of those broad areas of knowledge upon which he was questioned in this case. We respectfully submit that academic training in the general field of medicine, even when coupled

with training in the field of pharmacology, is not an adequate basis for determining that a person is competent to render an opinion which, for all practical purposes, constitutes a critical influence upon the jury and will substantially affect the outcome of litigation.

Petitioner is aware of the decisions of other Courts of Appeals which have held that a physician does not have to be a specialist in the field of relevant judicial inquiry in order to be competent to render an expert opinion. E.g., Baerman v. Reisinger, 124 U.S. App.D.C. 180, 363 F. 2d 309 (1966); Hill v. Gonzalez, 454 F. 2d 1201 (8 Cir. 1972); Harris v. Smith,372 F. 2d 806 (8 Cir. 1967); Alvarado v. Weinberger, 511 F. 2d 1046 (1 Cir. 1975). See, also, Frost v. Mayo Clinic, 304 F. Supp. 285 (D. Minn. 1969). The trend is developing to allow the testimony of any person better qualified or more knowledgeable than the

juror. Rule 702, F.R. Evid. We submit, however, that such trend should not be permitted to form a sole basis for accepting the testimony of any witness with such knowledge when there may be many better qualified professionals in the particular field whose opinion could really be deemed an "expert" opinion. This Court has never decided whether, in the case of an expert witness who has acquired knowledge through formal education, there is any necessity that such a witness should also be experienced in the particular area within the broad field in which he has been educated in order to be a competent expe-t witness.

There has been a tendency to divide expert witnesses into two classes: skilled and expert. See Ladd, Expert Testimony, 5 Vand. L.Rev. 414, 421 (1952). In the case of skilled witnesses, or those who have come by their special knowledge through direct association and exposure to that about which they testify, the courts have consis-

tently required the offeror of such testimony to prove that the person offered as an expert is truly knowledgeable about the particular point of inquiry. See, e.g., Union Ins. Co. v. Smith, 124 U.S. 405 (1888); Gila Val. G.& N. Ry. Co. v. Lyon, 203 U.S. 465 (1906); The Catherine, 58 U.S. 170 (1854); New York & Colo. Min. Synd. & Co. v. Fraser, 130 U.S. 611 (1889); Stillwell & Bierce Mfg. Co. v. Phelps, 130 U.S. 520 (1889). But, where a person has been formally educated in an area generally including the subject matter relevant to the point under inquiry, the courts have given excessive weight to the fact of education, rather than the extent of special knowledge, ralative to the point being considered. The case sub judice, as well as those initially cited in this Part of this Petition, represent somewhat mystical concessions of expertise upon men with professional degrees. We respectfully submit that this is an improper legal standard for accepting any

professional as an expert in a particular field of knowledge relevant to a judicial proceeding. Even though the trial judge's discretion in the determination whether to accept or reject an expert witness is ordinarily given great weight and will be overruled only where the judge's ruling constitutes manifest error, the application of an incorrect legal standard for determining competency is well recognized as a basis for determining that the trial judge abused his discretion. E.g., Miley v. Delta Marine Drilling Co., 473 F. 2d 856 (5 Cir.), cert. den., 414 U.S. 871 (1973).

The issue of the standard of acceptability of a person as an expert witness is no insignificant academic exercise. Rather, it is one of great importance to the administration of justice in the courts of this nation.

> Moreover, as Professor Ladd has stated, "The qualification of an expert is not perfunctory, although its significance

> and its ultimate effect upon evaluation of the testimony is sometimes overlooked. If the expert is permitted to testify because of his experience through which he has gained special knowledge, that experience is as important to the weight of his testimony as it is to its admissibility."
>
> Dean Mason Ladd, "Expert Testimony," Vand. L.R., Vol. 5. (1952) p.422.

The need for actual experts possessing the specialized expertise required to aid the jury on the precise question presented to it is obvious. Professor Wigmore, in his treatise on evidence, contended in favor of the proposition that all expert witnesses should be called by the Court, which would select such witnesses for their recognized expertise in the relevant area of inquiry, rather than allowing the parties to shop "for experts" who would give the opinion suited to the objectives of the contesting litigants. II Wigmore, Evidence §561, p. 643 (Chadbourne ed.). While this position has not been adopted by the federal courts,

1/ it is a clear expression of concern from a venerable source that opinions of experts presented at trial are not necessarily the opinions of the majority of experts in the relevant field of inquiry and that litigants do shop for opinions which aid their cases. Since the courts have left it to the adversary parties to produce their own experts, the very least that should be expected of the courts is the dedication or the assurance that it will not allow a party to produce a witness who does not possess the required special expertise.2/

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1. "Some states have enacted statutes providing for the appointment of expert witnesses. Such statutes have been generally held to be constitutional." Francis X. Busch, Law and Tactics in Jury Trials, Encyclopedic ed. Vol.4, (1961), p. 19.

2. "Trial courts are inclined to indulgence in accepting suggested qualifications as sufficient, and frequently admit proffered so-called expert testimony on a bare prima facie showing, with the statement that the jury has heard the qualifications of the witness and that the objection to the sufficiency of his qualifications goes to the weight rather than to the competency of his testimony." Busch, op. cit., pp. 22, 27.

Professor Wigmore stated the universally accepted rule to the qualifying of experts, as follows (II Wigmore, op. cit., supra, §560, pp. 640-641):

> "The possession of the required qualifications by a particular person offered as a witness, must be expressly shown by the party offering him. This follows from the nature of the situation (ante, §556), and is universally conceded. (Emphasis in original.)"

The only qualifications shown by the Government in this case were the academic credentials of the witness. The very opinion he was called upon to render was not an academic, but a practical, aspect of the practice of medicine, i.e., the legitimate scope of professional practice. Dr. Shirkey admitted that his professional practice was limited to children; that he did not treat obesity; and especially, that he had never prescribed the drugs here involved. How, then, could he have been properly regarded to be an expert on the issues with which this trial dealt, i.e., the treatment of adult obesity with the controlled substances

mentioned in this indictment?

It seems obvious that if the field of medicine is so broad that the profession itself subdivides into specialties and sets curricula and standards for the exercises of diagnosis and treatment required to be known before one would qualify as an expert within the medical profession, the Courts should be at least as solicitous of the medical profession's own recognition of the limitations upon the possible degree of expertise any one physician could reasonably possess. It has been stated by Dean Busch, in 4 Law and Taxtics in Jury Trials (Ency. ed. 1961), p. 19:

> "The trend in medical and many other sciences is toward specialization. This should be an important consideration in the selection of experts. For instance, if the case is one involving plastic surgery, the opinion of a general practitioner of medicine, with limited experience in that special department of surgery, carries little weight as against the testimony of a surgeon who devotes all or most of his practice to that specialty."

While this statement tends to relate to the weight, rather than the admissibility, of expert testimony, it also demonstrates that variation exists in the degrees of expertise possessed by different doctors according to their specialty. The Courts, when dealing with expert testimony, should require the same degree of knowledge and experience as the medical profession requires before deeming a doctor to be an expert within the profession on the subject matter of the judicial inquiry.

To have jury verdicts, especially in criminal trials where the reasonable doubt standard of proof is required, turn upon opinions rendered by ordinary physicians or even specialists in other fields about matters outside their specialty is an important legal problem, one which urgently calls for the distinguished supervision of this High Court, to be set right.

For the foregoing reasons, this Court should grant the writ of certiorari applied

for herein and, after due proceedings be had herein, this Court should reverse the judgment below.

II

This Decision Departs From the Acceptable Court Of Judicial Decisions And Decides An Important Question Of Federal Law Which Has Not Been But Should Be Decided By This Court.

The Fifth Circuit reviewed the transcript of the proceedings below and found that "the questions posed by the prosecutor were only slight variations from the testimony theretofore taken during the trial." 549 F. 2d at 337. For reasons which appear hereinbelow, we respectfully submit that the opinion below is factually erroneous and that the departures from the testimony of the undercover agents constituted substantial variances which, in effect, called for an opinion upon a substantially different foundation than those presented through the evidence actually adduced.

The answers to hypothetical questions are not evidence in the usual sense but rather only a source of guidance which the jury may use in interpreting the actual evidence presented to it.[3] See Meyers v. Weinberger, 514 F. 2d 293 (6 Cir. 1975). Hypothetical questions should therefore remain within the evidence and include only such facts as are supported by the evidence.[4]

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3. "Expert opinion evidence on some subjects is entitled to greater weight than on others ... Other expert opinion evidence, notably medical opinion based on hypothetical statements of fact, has been the target for much unfavorable criticism." Bush, op. cit., pp. 161, 162.

4. "The weight to be accorded an expert opinion stated in answer to a hypothetical question depends entirely upon whether the facts selected and assumed are the salient facts, whether they have been established by the evidence, and on the soundness of the opinion, tested by its reasonableness, the cogency of the reasons offered to support it, and the ability, fairness and apparent integrity of the expert. These are all questions for the jury's determination. Id., p. 124.

Grand Island Grain Co. v. Ronsh Mobile Home Sales, Inc., 391 F. 2d 35 (8 Cir. 1968). Where a hypothetical question embraces an important fact not supported by the evidence, it is defective and should not be made the basis of a jury's verdict. Ibid; Minneapolis, St. P. & S.S.M.R. Co. v. Metal-Matic, Inc., 323 F. 2d 903 (8 Cir. 1963); Logsdon v. Baker, 366 F. Supp. 332 (D.D.C. 1973), vac. on oth. grnds., 170 U.S. App. D.C. 360, 517 F. 2d 174 (1973). Where the factual foundation for an expert witness's opinion proves nebulous, such testimony is inadmissible as mere speculation and conjecture and is irrelevant to the issues presented. Atlantic Life Ins. Co. v. Vaughan, 71 F. 2d 394 (6 Cir. 1934), cert. den., 293 U.S. 589 (1934); Logsdon v. Baker, supra. Where hypothetical questions propounded to an expert include one party's claims and interpretations but omit highly relevant facts which could be fairly claimed to have been proved,

the questions are misleading and unfair and the answers are meaningless and irrelevant to the issues on trial. J. Gerber & Co. v. S.S. Sabine Howaldt, 437 F. 2d 580 (2 Cir. 1971).

> "The assumptions in a hypothetical question should be consistent with each other, and should be fairly stated, without exaggeration or distortion. They should be revealed in their entirety in the hypothesis so that the witness' opinion will be based solely upon facts of which the jury has been made aware." Busch, op. cit., supra, pp. 100-102, and authorities cited.

In the course of the direct examination of DEA Agent Dennis Ray Price, he testified as follows:

> [Dr. Viglia] asked me if I had ever had any medical problems before, and I told him that about a year before I had had a heart attack.
>
> Dr. Viglia said, "Heart attack?" and I said yes, and he said, "I can't prescribe these drugs if you have any kind of heart trouble," and then he asked me when I had ever taken "Upper" or "Speed," and I said, "Oh, a few years ago," and he said, "I think you're kidding me about the heart attack," and I told him I wasn't kidding him, and he said, "Well, I can't prescribe these if you have heart trouble," and then I said, "Okay, doc, I didn't have any heart attack."

> He said, "What made you say you had had a heart attack?" and I said, "Well, it was actually a mild pain around my heart; actually I don't know what it was," and so we talked a few minutes more about it.

(Tr. 25-26.)

From this testimony, it is obvious that Dr. Viglia was not suggesting any answer to any question posed by him to his apparent "patient,' Agent Price. Dr. Viglia's statement that the drug was contraindicated in patients with a history of heart trouble. Dr. Viglia's statement that he felt Agent Price was kidding him was also not suggestive that Agent Price say he was kidding Dr. Viglia. Rather, it obviously was an expression of incredulity after Dr. Viglia had made an auscultatory examination of Agent Price's heart and Dr. Viglia's nurse had taken Agent Price's blood pressure. Yet, in the first hypothetical question posed to Dr. Shirkey by the prosecutor, the following assumption was made (Tr. 82-83):

"Assume further that the physician then asks the patient if he is allergic to any drugs and the patient says no, but that then the patient says, "I had a heart attack last year, Doc."

Assume that the doctor then says, "Heart attack. I can't prescribe for you if you have a heart condition. Have you seen a doctor?"

Assume that the patient sayd, no, he hasn't seen a doctor, but that it was only a mild heart attack, with a little pain around the heart.

Assume that the physician then says, I can't prescribe this tyep of medicine, Preludin, to anyone with a heart condition, and then the patient says he was just kidding about the heart trouble. When he came in asking for "Speed" and mentioned the heart trouble, the doctor said he couldn't give him Preludin, and then the patient said, "Well, in that case I am only kidding. I never had a heart attack. Okay, Doc?"

To which the physician then replies, "Okay, as long as you understand."

The assumption the prosecutor asked the expert witness to make in the very first hypothetical question distorted the evidence adduced in that the hypothet pictured a physician who was unconcerned with the patient's health and was concerned only

with obtaining his own suggested answers to his questions in order to justify writing the prescription. The hypothetical question has the patient volunteering the information about a prior heart attack, whereas the evidence demonstrated that Dr. Viglia had elicited this information while taking the purported "patient's" history. The hypothetical question portrays the patient telling the doctor, after the doctor suggests that he cannot prescribe this type of drug to someone with a history of heart trouble, that the patient was kidding the doctor, whereas, the doctor expressed the belief the patient was kidding him, presumably for the good reason that there were no objective findings of heart trouble in the physical examination, however brief, which Dr. Viglia had previously made. All of these assumed facts distorted the procedure utilized by Dr. Viglia. They obviously did picture a case of medical proce-

dure which did not conform to acceptable clinical procedures. But the foundation upon which the hypothetical question was based simply was not relevant to this case because it did not conform to the evidence and the answer based upon such a hypothetical scenario was thus clearly misleading and unfair to Dr. Viglia. But this presents only a portion of the distortion in the direct hypothetical examination of Dr. Shirkey. Other equally egregious distortions of the evidence continued to occur.

The next assumption the prosecutor asked the expert witness to make was that there had been a dialog between the doctor and the patient concerning the use of marijuana. The hypothetical question asks the expert to assume that the patient said he smoked marijuana, that he had seen a marijuana cigarette in the days before which was twelve inches long, and that the doctor made some comment which implied an air of

approval or complacency regarding the use of illegal drugs. (Tr. 83) The witness' testimony was that he did not smoke marijuana but that he liked to get high on "Speed." (Tr. 26)

The next false assumption the prosecutor asked Dr. Shirkey to make was that Dr. Viglia told the patient that he had to have a medical reason for prescribing the drugs, but "If you want to get high, I understand your problem." (Tr. 83-84) No such testimony appears in the record.

The continuation of the same first hypothetical question also asks the expert witness to

> "Assume further that during the course of this physical examination, the patient asks, "Why do I have to go through all of this for some lousy Speed?"
>
> Assume that the physician tells the patient that he has to take precautions, that he has to do the examination, because the Medical Board requires him to do so, and that if he doesn't show a medical reason for giving the patient Preludin, he could be in serious trouble."

No corresponding testimony of either undercover agent appears in the record. The prosecutor's imagination is the exclusive souce of these damaging "facts", incorporated into the hypothetical foundation which the Government expert was asked to assume.

At the conclusion of this (5-page) first hypothetical question, the prosecutor asked Dr. Shirkey to reflect on what he had been asked to assume and declare whether the issuance of the prescriptions were in the course of professional practice and for a legitimate medical purpose. (Tr. 86) Of course, so presented the witness declared that it was not. (Ibid.) But the very first of this long series of hypothetical questions grossly deviated from the evidence. The jury's reliance upon the opinion answer to that question was tantamount to its relying upon evidence not adduced from the witness stand, contra Turner v. Louisi-

ana , 379 U.S. 466 (1965).[5]

In the second hypothetical question, after giving the expert witness the facts to be assumed, the prosecutor asked the witness (Tr. 87):

> "In the past situation that I just described for you, Doctor, and relating to the first hypothet I gave you, was this prescription * * * given in the course of professional practice and for a legitimate medical purpose?"

The nebulous and inaccurate impression upon the witness created by the divergence from fact in the first hypothetical question tainted the opinion answer given by the witness to this hypothetical question.

The third hypothetical question also asked the expert to continue to assume the facts of the first two hypothetical questions. (Tr. 88)

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5. "The opinions expressed, if founded upon carefully presented factual date, enable the triers of fact to understand and apply them rather than be forced to accept or reject them on their determination of the reliability of the expert only." Ladd, op. cit., supra, at 422.

In the fourth hypothetical question, the witness asked, "That fact situation would be considered a continuation of the other, is that right?" (Tr. 89) When the prosecutor answered in the affirmative, the expert witness responded, "Then the answer is no." This clearly demonstrates the interrelationship of the expert witness' answers to the initial barrage of false assumptions the witness was asked to make. (Tr. 89)

Similar comparisons could be made to each of the hypothetical questions propounded. The foregoing examples, we respectfully submit, clearly demonstrate that the prosecutor unfairly interjected false assumptions into these questions which resulted in unfair prejudice to Dr. Viglia.

Has there been an objection to this rampant creation of misimpression, then the Court would have been required to sustain the objection. Grand Island Grain Co. v.

Ronsh Mobile Home Sales, Inc., 391 F. 2d 35 (8 Cir. 1968); Twin City Plaza, Inc. v. Central Sur. & Ins. Corp., 409 F. 2d 1195 (8 Cir. 1969); Meyers v. Weinberger, supra.

We respectfully contend that the prejudice was so obvious and the prosecutorial behavior was so obviously unfair that the Court itself had an obligation to require the prosecutor to conform his hypothetical questions to the evidence which had been adduced.

Because there was no objection, current counsel for Dr. Viglia was forced to raise this issue in the Court below as one of "plain error," cognizable under Rule 52(b), F.R.Cr.P. This, in effect, denied Dr. Viglia of the effective assistance of appellate counsel to the same extent the Fifth Circuit held that the Louisiana appellate procedure denied the effective assistance of appellate counsel in Sanford v. White, 398 F. 2d 478, 481 (5 Cir. 1968).

The hypothetical questions grossly, not slightly, deviated from the testimony and Dr. Viglia was thus extremely prejudiced by the expert opinion that the conduct recited did not conform to the professional practice of medicine. The facts upon which the determination was to have been made were those which were presented by the fact witnesses, not those presented to the expert witness. This unfair method of examination of the expert witness was such a marked departure from the ordinary course of proceedings[6/] involving expert testimony that this Court should exercise its supervisory jurisdiction and set aside the judgment which was so unfairly obtained.

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6. "Good trial practice, however, would nearly always require a careful statement of the facts. Such procedure is necessary to make a record, if hypothetical questions are to be asked." Ladd, op. cit., p. 422.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit, requiring it to transmit the record of these proceedings to this Court for review, and, after review is had herein, this Court should reverse the judgment and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for a Writ of Certiorari has been served upon the Solicitor General, by deposited same in the United States Mail, postage paid, addressed to him at Department of Justice, Washington, D.C. 20530.

New Orleans, Louisiana, this 17th day of June, 1977.

F. IRVIN DYMOND

APPENDIX A

Before MORGAN and HILL, Circuit Judges, and NOEL,* District Judge.

JAMES C. HILL, Circuit Judge:

On October 9, 1975, a federal grand jury in the Eastern District of Louisiana returned an indictment against the defendant, Dr. Peter A. Viglia, charging him with thirteen violations of 21 U.S.C.A. § 841(a)(1)[1] by issuing prescriptions for controlled drugs without a legitimate medical reason. After a two-day trial, the jury returned a verdict of guilty as to each of the offenses alleged in the indictment. We affirm.

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1. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally---(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

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* Senior District Judge of the Southern District of Texas, sitting by designation.

The Government's first witnesses were two agents who had posed as patients and obtained prescriptions for controlled substances from the defendant. The Government then called Dr. Harry C. Shirkey, a physician from the Charity Hospital of Louisiana at New Orleans, and, over objection, had Dr. Shirkey accepted as an expert qualified to give an expert medical opinion on the bounds and scope of professional practice and the legitimate or illegitimate use of the controlled substances involved in the case. The Government then proceeded to propound a series of hypothetical questions somewhat at variance from the evidence adduced at the trial. In short, the prosecution's expert testified that the defendant's prescriptions for the drugs were without a legitimate medical purpose.

The defense called Dr. Jerome R. Ryan as an expert who testified that he conducted treatment on the same type of patients as

those for which the defendant mistook the undercover agents. The defense also produced three patients of the defendant's who had successfully responded to the same treatment as that which was offered the undercover agents. Finally, the defendant testified and the defense rested.

The defendant first contends that the district court erroneously accepted the Government's physician as an expert witness. The defendant objects mainly on the grounds that the Government's expert testified that his principal area of practice was in pediatrics and that he admitted that he did not treat obesity at all. However, Dr. Shirkey did have a degree in medicine and a degree in pharmacy. He stated that he had written several articles dealing with drugs and that he was a member of the Drug Research Board of the National Research Counsel. Dr. Shirkey had been an assistant in Pharmacology at the University of Cincinnati and had been made an Associate Professor of

Pharmacopoeia for ten years. Finally, Dr. Shirkey stated that he had occasion to participate on several committees with respect to the treatment of obesity.

[1,2] It is well recognized that the trial judge possesses a broad discretion in passing upon the qualifications of an expert. *United States v. Wysocki, 457 F. 2d 1155, 1161 (5th Cir.) cert. denied, 409 U.S. 859, 93 S. Ct. 145, 34 L.Ed.2d 105 (1972); DeFreese v. United STates, 270 F. 2d 737 (5th Cir. 1959), cert. denied, 362 U.S. 944, 80 S. Ct. 810, 4 L.Ed.2d 772 (1960).* The decision of the trial court will not be disturbed on appeal unless it is manifestly erroneous. See *United States v. Lopez, 543 F. 2d 1156, 1158 (5th Cir. 1976).* While Dr. Shirkey had no experience in treating patients for obesity, his knowledge, training and education in the fields of medicine and pharmacology were a sufficient predicate on which the trial court might accept him as an expert. See Fed.R.Evid. 702. We certainly can find no

manifest error in this decision and the weight of his testimony was for the jury.

[3] The defendant also contends that his right to a fair trial was impaired when the prosecutor posed certain hypothetics to Dr. Shirkey which did not conform to the evidence in the case. However, a review of the entire transcript of the trial reveals that the questions posed by the prosecutor were only slight variations from the testimony theretofore taken during the trial. No objection was raised to any of the hypothetical questions and their admission, if error at all, does not amount to plain error affecting substantial rights. *See United States v. Garcia, 531 F. 2d 1303 (5th Cir. 1976).*

In sum, we find no reversible error in the conduct of the trial of this case and the jury's verdict is due to be

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

May 20, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-1235 - USA v. Peter A. Viglia, M.D.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the

mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. F. Irvin Dymond
Ms. Mary Williams Cazalas